(More information on this item, 'Programs and models from other states', is being provided in advance because people often have questions about the Option to Purchase at Agricultural Value (OPAV) mechanism during the meetings. The audience members at one county meeting also specifically suggested we send it out ahead of time for the other counties.)

Appendix – Topic 5: Programs and models from other states

- **Massachusetts** – Agricultural Preservation Restriction (i.e. Farmland preservation) Program
    - Housing policy – farmland is preserved on its own
    - Option to Purchase at Agricultural Value
    - Land must be actively farmed
    - Program name

Massachusetts' first two responses to the issue of farmland affordability came in the mid-1980s. To discourage non-farmers from buying and bidding up the price of preserved farmland, MA 1) added a Right of First Refusal to its deed of easement and 2) began preserving just farmland, i.e. land without houses or housing opportunities. MA's process became the following: it would separate any houses from the land (i.e. subdivide the house to create a new separate property for it) during the preservation process and not allow any houses to be built on the land in the future. Sometimes farm infrastructure is subdivided along with the house, such as if there are farm buildings near the house in a farmstead cluster. In other cases, sometimes farm infrastructure stays with the preserved land.

Around 1992, MA began including an "Option to Purchase at Agricultural Value" (OPAV) in its farmland preservation deeds of easement. MA took this step in response to criticism from farmers that non-farmers were continuing to buy preserved farmland, thereby: making it unaffordable, taking it out of productive agricultural use, and undermining the public investment in the program. There were examples of preserved farms, even those without any housing opportunity, being purchased by non-farmers (e.g.: people living next to the preserved farmland who wanted it for scenic views, recreational purposes, etc.)

The Option to Purchase at Agricultural Value represents an additional restriction in the deed, so the farmer gets more money up front for the easement. What OPAV does is it later guarantees that a preserved farm, when it's sold, is sold at a farm supportable price, i.e. what a farmer would pay for the farm for the purposes of operating a profitable farm business. It's the fair market price a farmer would pay when competing with other farmers. (Farm values continue to appreciate, on a farm basis.)

The leverage of OPAV is its power as a deterrent (it gives MA the 'option' to purchase a preserved farm at its agricultural value when the farm is about to be transferred). If the purchaser is buying the farm at a well-beyond competitive farm-value price, or if the purchaser doesn't have a plan for maintaining the land in agricultural use, MA could step in and exercise its option. It could purchase the farm at its agricultural value (and then resell the farm at that value to another farmer). Or it could assign to another farmer the right to purchase the farm.

In actuality, MA has never exercised its option. In every case so far, the option has been waived. (There is also an automatic waiver for transfers between family members.) OPAV has been largely self-regulating in this way. It encourages the landowner to sell the farm to a bona-fide farmer and the buyer to not pay more than the farm's fair market agricultural value. Non-farmers can still buy (and have bought) preserved farms after OPAV, however the new owners must have a plan to maintain the land in agricultural use, i.e. they must have a plan to lease it to a farmer.

What OPAV does essentially is add a step to the real estate transfer process to ensure the transfer will occur at agricultural value. This step involves MA considering two submissions: the bona-fide sale-and-purchase agreement and the prospective buyer's written plan to keep the farm in agricultural use (either by farming the land or leasing it to a farmer). In 15 years, as mentioned above, the option has never been exercised.

As part of the deed, OPAV runs with the land and applies to every future transfer. The idea is that the benefit of affordability gets passed from one farmer to the next, or perhaps from one generation to the next. Also, the land must be made available for farming if someone who isn't a farmer owns the land. OPAV has thus been good for the reputation of the program. It also hasn't been a barrier to applications according to MA officials. Farmers have been willing to accept it since it applies to everyone. The main opposition has come from those who want to 'take two bites out of the same apple.'

An evolving issue with MA's housing policy has been the question of how to address a farmer's need or desire to live on or near a preserved farm. Houses separated during the preservation process don't necessarily transfer with the land to the next farmer. There may or may not be other housing available nearby. In the past few years, MA has started to discuss these issues and ways to address them, outside of OPAV.

Market-wise, MA has found there is strong demand for preserved farms without housing opportunities – particularly in areas with vibrant agricultural economies. Preserved land in the Deerfield Valley, for instance, has sold for as much as $10,000/acre, at its agricultural value. Land in more rural or less prosperous hill-town areas might go for $2,000/acre, and it may sit on the market for a while before being sold.

MA's deed of easement also has an 'affirmative covenant' that requires the land be farmed. This ensures the land remains in agricultural use and is not abandoned. Of note too is the name of MA's program – the Agricultural Preservation Restriction (APR) Program. This reiterates the program's purpose – to preserve the agricultural industry – and affirms that the program is an agricultural as opposed to an open-space program.

- **Vermont – Farmland preservation program**
    - Option to Purchase at Agricultural Value (OPAV) – voluntary
    - Housing opportunity policy – somewhat similar to MA's policy
    - OPAV waiver provision

In 2003, Vermont, responding to the same types of issues as MA (there had been a few high-profile cases of preserved farms being sold to non-farmers), decided to include a similar Option to Purchase at Agricultural Value (OPAV) component in its program. One difference in VT is that OPAV is a voluntary feature of the program. VT leaves it to the applicant to decide whether to include OPAV in their farmland preservation deed of easement. Each farm is appraised with and without OPAV, and then the applicant chooses (unless the parties agree ahead of time to definitely include OPAV, in which case only the valuation with OPAV is done). VT policy-makers have reexamined VT's farmland preservation policy on a regular basis since 2003, including the program's use of OPAV. VT's most recent policy statement (5/18/07) describes how although OPAV remains a voluntary feature of the program, preserved farm applications with OPAV receive a higher priority. It also says that VT "expects it to be included in most farm projects."

Another difference between MA and VT involves how houses are treated. When a farmland preservation applicant chooses to add OPAV, one item to be decided is whether the farm's houses will be excepted from the coming deed restrictions. Houses, if excepted from the easement, remain part of the to-be-preserved farm but may be severed from the preserved property in the future (i.e. subdivided so as to create a separate property). This is somewhat akin the "severable exception" model we know in NJ, whereby (in NJ) existing and future house sites can be excluded from the easement and then subdivided from the preserved property in the future. In VT, a farm's farmstead infrastructure may also be included with the house in this 'severable exception' area.

At the time a preserved farm (a farm with OPAV and where the house is in a 'severable exception') is being resold, the house may or may not be subdivided from the farmland and transferred separately. (OPAV applies only to the land in these cases.) Alternatively, if the house was not included in a 'severable exception', OPAV applies to the whole farm, land and house together.

Since 2003, when landowners were first given the option of including OPAV in their easements, most applicants have chosen to include it. (In 2006 more than 90% chose to do so.) Of this group, 70-80% has also decided to separate their houses from the preserved land by placing the house in a severable exception area. In general, VT also has a policy (like MA) of no future housing opportunities on preserved farms. As in MA, in VT a main purpose of this policy and OPAV is to discourage non-farmers buyers.

At the initial public meetings when OPAV was discussed, there was much farmer opposition to the OPAV concept. Now, as more farms are being preserved with the option, and as some of these farms are being resold, farmers are becoming more comfortable with it and are seeing its value in terms of the affordability question. Support from farmers also stems from the positive impact that including OPAV has on easement values. Easement values, which are relatively low compared to those in NJ

($1000-$2000/acre in VT), are often doubled with OPAV. As more resales have occurred, appraisals have also become easier.

Part of the initial opposition in VT had to do with the prospect of additional government involvement. In response, VT created a provision allowing for an automatic OPAV waiver. VT automatically waives its Option to Purchase at Agricultural Value if the preserved farm is being purchased by a farmer (or being transferred to a family member, as in MA). For the purposes of defining 'farmer,' VT uses the IRS definition, which is that at least 50% of the person's gross income comes from the farm business. At the time of pending resales, VT follows a similar procedure to MA regarding addressing OPAV. VT considers the sale-and-purchase agreement and the buyer's written farm business plan and agricultural experience. Except for a single case in January 2007 (in which the option was exercised), the option has always been waived because each transfer has been from one farmer to another.

Like MA, VT also continues to debate the issue of available housing for farmers. Is separating housing a good idea? Is there a way to allow for a house and at the same time ensure a preserved farm will remain affordable? These are a few of the questions VT is discussing. VT still has a policy preference for excluding houses, however some (perhaps 25%) of VT's recent preservation applications – i.e. those that either don't have a house or have made the house severable – have been afforded a future housing opportunity. This opportunity has come with a size limit of 1500-1800 sq. ft.

More on the MA Farmland Preservation Program

From the Massachusetts Department of Agricultural Resources website, http://www.mass.gov/agr/landuse/APR/index.htm

1) Agricultural Preservation Restriction (APR) Program

"The APR Program is a voluntary program which is intended to offer a non-development alternative to farmers and other owners or "prime" and "state important" agricultural land who are faced with a decision regarding future use and disposition of their farms. Towards this end, the program offers to pay farmers the difference between the "fair market value" and the "agricultural value" of their farmland in exchange for a permanent deed restriction which precludes any use of the property that will have a negative impact on its agricultural viability.

The state's investment in the APR Program benefits farmers, the state's agricultural industry, the state and local economies, consumers and the general populace in a number of important ways….

"APR restricted farmland represents an opportunity for young farmers just entering the business and other farmers in need of additional land to purchase affordable farmland. The program serves to stabilize farmland values and guarantee the long-term availability of farmland. This factor is especially important in areas with escalating land values and is critical for farmers who rent a large percentage of the land that they farm…"

More on the VT Farmland Preservation Program

From the Vermont Housing and Conservation Board (VHCB) website:

[In VT, VHCB coordinates the state's farmland preservation program, among other things.]

1) VHCB Policy Position – Funding Conservation of Agricultural Land – 5/18/2007
http://www.vhcb.org/agricultpolicy.html

"Goal
It is the intent of the State of Vermont to perpetually protect and preserve agricultural lands, encourage sound soil management practices in accordance with generally accepted agricultural practices, preserve natural resources, maintain land in active agricultural use and make reasonable efforts to assure that conserved farmland is accessible and affordable to future generations of farmers. To accomplish this goal, and to promote a strong agricultural economy, VHCB will give priority to farmland conservation projects in strong farming communities, support agricultural innovation and diversification, and encourage projects that facilitate intergenerational transfers
…

"VHCB Farmland Conservation Activities

…The primary farmland preservation activity of the Board is funding the purchase of development rights and placement of conservation restrictions on farmland. The conservation easement ensures that the land will not be developed, while providing for uses compatible with farming.
…

"Project Configuration
Goal: The configuration of agricultural conservation projects shall maximize the protection of important agricultural soils, promote the long term, economically viable use of the land for agriculture, and include mechanisms that address and mitigate concerns over the affordability of the property to farmers in the future. (Tools to address future affordability are discussed below.)

For farms that have buildings associated with them, particularly residences, VHCB will favor the 'Farmland' configuration (i.e., excluding the infrastructure), unless the 'Whole Farm' configuration includes an appropriate affordability mechanism.
…

"Future Affordability of Conserved Farmland

Goal: The Board has adopted a policy goal, which includes making reasonable efforts to assure that conserved farmland is accessible and affordable to future generations of farmers. In addition, the Board's goal includes encouraging intergenerational transfers that support owner/operated farm projects. This goal will be furthered through the appropriate application of the following tools during the configuration stage of each project.

[Note: Though the VT policy lists five affordability tools or mechanisms (below), VT essentially uses only the first two, Exclusion of Infrastructure and Option to Purchase at Agricultural Value. As VT continues to discuss ways to address the housing question, it is also beginning to use the last one, Design Controls, a little.]

Affordability Tools:

Exclusion of Infrastructure – Structural improvements on farm properties, especially residences, may contribute disproportionately to the market value of the farm, and therefore will generally be excluded from the easement and made severable from the conserved land in the interest of preserving the future affordability of the protected property. See Configuration Guidelines below for specific guidance on establishing farmstead exclusions.

Option to Purchase at Agricultural Value – VHCB will prioritize projects with the OPAV, and expects it to be included in most farm projects. All farm projects will be appraised both with and without the OPAV, unless the landowner and Grantee agree ahead of time to include the OPAV in the project, in which case only one after value, with the OPAV, is required. If the landowner declines to accept the OPAV, VHCB expects the applicant (the Grantee) to clearly explain why the project does not include it and articulate why the project merits funding and how it meets VHCB's goals despite this. The Board will weigh factors including, but not limited to, degree of estate risk and potential loss of the resource for commercial agriculture, proximity to other conserved lands (particularly filling in gaps in blocks of protected farmland), and other important resource values, in evaluating the funding of farm projects without the OPAV.

Shared Appreciation Agreement – Similar to the model developed by community land trusts, the farmer and the Holders agree that, upon resale of the protected property, the farmer and the Holders would share any appreciation in the farm's value, according to an agreed-upon formula. The Holders would then reinvest their share of the proceeds to reduce the sale price to the next buyer.

Nonprofit ownership of conserved farm with CLT approach to house - In some cases nonprofit conservation organizations may decide to purchase whole farms or farmland, convey a conservation easement to a qualified holder and lease the land and buildings to a farmer. In such a case, sustainable farming and affordability mechanisms can be built into the lease to insure affordable farming (perpetual access to the farmland by farmers) and resales of houses, if any, which are affordable to future farm households of moderate incomes.

Design Controls –For some projects, the Board may choose to include houses or rights for house sites, but condition the improvements (by limiting size, scale and location) to make the protected property more affordable for future farmers.

Grantees are encouraged to consider some or all of these mechanisms, alone or in combination, to further multiple goals and objectives. Grantees are also encouraged to work with VHCB staff to identify variations on these particular tools, or to develop new mechanisms that can address farm affordability effectively."

2) Web-pages with some background information on OPAV that VHCB circulated in 2003/2004 in advance of public meetings with farmers on the idea of including OPAV in part of the farmland preservation program:
http://www.vhcb.org/agoption.html#summary
http://www.vhcb.org/agaffordability.html

3) Information on the one time OPAV was exercised in VT
http://www.vlt.org/BensonFarm/How_to_Make_an_Offer.html

4) A portion of the testimony by Mike Ghia, a VT farmer, in support of OPAV and providing additional ideas for VT to consider

[*This was written in 2003/2004, when the agricultural community in VT was discussing farmland availability/affordability and OPAV.]*

- Mike Ghia
- Farmer, Ewetopia Farm, Rockingham, VT
- Member, Advisory Committee, Land Link VT
- Member, Farmer Advisory Committee, Northeast Growing New Farmers Consortium

"Our Own Experience

In my previous written testimony, I did not expand on our experience in this arena. For almost 5 years, we rented a conserved farm in Westminster. When the owner agreed to sell us the farm in 2000, we had an appraisal done by the same appraiser who had appraised the farm in 1995 as a part of the easement sale. When the appraisal came back three month and $800 later, the fair market price of the conserved farm, which consists of 2 houses, one of which has two apartments; 100 year old bank barn, three other out buildings; 135 acres of which 100 were open, about 25 were tillable, and 5 had prime soils, was $340,000.

The most interesting aspect of this appraisal was the short-term growth of this "conserved farm" and the influences that contributed to it. When the current owners bought the farm in 1995, they did so with the help of the VLT, the VHCB, and the Freeman Foundation. The conservation easement sale had brought their purchase price down to $252,000 from an original appraisal of $415,000. The 35% increase in the farm's value between 1995 and 2000 was partially due to the renovation and division of the larger house. However, the greatest influence was the local real estate market. The appraisal noted that real estate values in the area had grown by 20% in the previous 5 years.

Of the $340,000, the appraiser attributed about $133,000 to the two-family house and its associated 2.4 acre subdivision which was in place prior to the easement. The owner wanted to keep the second house, and we just assumed not to have it due to the extra expenses. However, the 3 easement holders all had different opinions on whether this split would be possible and how it should be addressed. At one point, we were asked to sign onto an "OPAV" and did so with some hesitation. The VHCB also asked the owner to pay for the right to keep the second house. However, the owner had decided that things had gotten too complicated, and the issue over the second house ultimately gave the owner a legal means to back out of his contract with us two weeks before closing.

Ultimately, our lease was terminated so that the owner could use the farm to expand his own operation, and we were forced to move. We have been looking for almost 4 years for a farm in Windham or southern Windsor County that we can afford, with or without a conservation easement, with no success. Our experience had helped shape our views on farm affordability.

Getting Beyond Concerns and Politics

I recognize that there has been very little support from farmers for the OPAV up to this point. In fact, there has been outright opposition. I was very distressed this morning to hear on the radio that the VT Farm Bureau has come out against this option. As a FB member, I will say that this does not represent my view. What I find particularly disturbing is that I think that there has been too little economic data put out there for anyone to use to make a stand one way or the other yet. I think there are some people that are just opposing the idea on philosophical grounds. Even today, there are still many farmers who disagree with the whole idea of conservation easement entirely on philosophical grounds. There are others who, over time and with greater familiarity, have come to accept and even embrace the idea of conservation easements. Perhaps with enough thought and discussion and data, some of the opponents of the OPAV may come to accept the idea? Perhaps it should be a voluntary option for an easement at least for the time being?

But, what ever happens from here, I hope that the VHCB will not drop the idea, or the issue. I think that many legitimate concerns have been expressed. But, in my mind, I don't think any of them could not be addressed with careful thought and research. I found myself wanting to jump up at the WRJ hearing and address counter points to each of the concerns that I heard. I thought that I might try to do that on paper today. But, in the interest of brevity, I want to expand here on only one concern, the value of the OPAV.

The Value of the OPAV to the Farmer

According to what has been put forward to date, with the addition of the OPAV, the landowner will theoretically receive funds in addition to what they otherwise would have gotten for their development rights. Thus, when I look at the OPAV, I see that the landowner is getting a "bonus check" with their development rights' sale as compensation for this option. The questions in my mind are: 1) what is the size of the bonus; 2) is it enough to be fair to the landowner and to allow for perpetual affordability; 3) what do the farmers do with that bonus money; 4) what are the taxes on it?

In the theoretical example that the VHCB has put forward, the "bonus check" for having the OPAV is $50,000. If the farmer receives that money, and buys a tractor that s/he sells in 10 years for $10,000, then the money is not worth much. But, what if they treated it as retirement/investment money? I asked Phil George, the Investment Broker who handles the money for Windham County Farm Bureau to run some projections for me. If the farmer puts the **$50,000 into an Annuity or Mutual Fund, then the money grows, in theory, as follows:**

$50,000 @6% return (conservative investment fund)

10 years: $84,473

20 years: $151,279

30 years: $270,919

If it was in a more aggressive stock fund, then the returns could be more like 8-10% on average. This would be in addition to whatever they get for the farm.

Taxes, of course, play a roll here. If the $50,000 is taxed, then there is less to go into the fund. But, perhaps changes in the tax laws could be made so that the seller of the development rights and the OPAV could receive this "bonus payment" "tax free or deferred" provided that they set up a retirement fund with the money. The other thing that farmers need to consider in this arena is, that by putting some funds elsewhere, they will probably help themselves tax-wise when they go to retire.   If their entire equity is in the one piece of real estate, when they go to sell it, they may have to pay more taxes than if they cashed in on the OPAV-restricted farm in a different year than when they start cashing in on their other funds.

Another other idea that farmers could consider is using that $50,000 towards buying an unrestricted piece of real estate that they could speculate on. If they really believe in real estate speculation as the means to guarantee their equity and retirement, than there are plenty other pieces of land and buildings in VT (or elsewhere) that they could bank on. **There is no reason why they need to speculate on the conserved farm, if they take that bonus money and invested it in other real estate.**

Likewise, this "bonus" payment helps a farmer who might be buying a farm at the time of easement sale. Again using the example presented, the new landowner/farmer might be buying the farm at $200,000 versus $250,000 without the OPAV**. By paying $50,000 less for the farm, the farmer might save around $4000/ year in mortgage payments on a 30 mortgage**. If the farmer only puts the money saved into their mattress, than **at the end of the 30 year mortgage**, **they will have $120,000 more than if they had bought the farm without the OPAV.** But, if that farmer takes that $4000/year savings and puts it into a retirement fund, then according to Phil, this is the result by the end of the mortgage is:

$4000/year put into an annuity/mutual fund yielding 6%:

30 years: $316,232

in addition to what ever they get for the sale of the farm, equipment, livestock, etc. Also, theoretically, they could also use the $4000/year savings to invest in unrestricted real estate, and speculate on the growth in its value.

One of the key questions, of course, is whether someone buying the farm at $200,000 will be able to make enough money farming to have that extra $4000/year to put into that fund? Perhaps the "agricultural value" would be more like $150,000 when we look at farm income potential from that farm? Furthermore, is the "agricultural value" at the end of 30 years still going to be affordable to the next generation, especially if the CPI is used and is high during those 30 years?

Clearly, more work needs to be done in this area. I think the relative lack of financial projections and alternatives in the discussion of the OPAV thus far has hindered any chance of people being open-minded to it. In any case, I think that it is important to look at ways that we can address farmers' financial concerns at both the beginning and end of their farming careers. I hope that this only the beginning of this discussion and not the end."